SJC-13047

COMMONWEALTH vs. ROY RAND.

Norfolk. March 1, 2021. - July 6, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, & Georges, JJ.

Constitutional Law, Confrontation of witnesses. Practice, Criminal, Confrontation of witnesses, Hearsay. Evidence, Hearsay, Testimonial statement, Spontaneous utterance.

Indictments found and returned in the Superior Court Department on October 13, 2015.

The cases were tried before Raymond J. Brassard, J.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Geraldine C. Griffin for the defendant.
Meagen K. Monahan, Assistant District Attorney, for the Commonwealth.

LOWY, J. On July 25, 2015, the victim called 911 and reported that her boyfriend, the defendant Roy Rand, had "just beat [her] up," "knocked [her] out a couple of times," and "tried to kill [her]." She stated that the defendant had left

her apartment "like two minutes ago." When officers arrived at the apartment minutes later, she was still on the telephone with the 911 dispatcher. She was so distraught that she appeared not even to register that police had arrived. Officers then spoke to her before she subsequently left in an ambulance.

The victim did not testify at the defendant's trial. Instead, the key evidence at trial was a recording of the victim's 911 call, and the responding officers' recounting of the victim's statements. The defendant was convicted of assault and battery, G. L. c. 265, § 13A; and strangulation, G. L. c. 265, § 15D.[1] The defendant appealed, arguing that admitting the victim's statements violated his right to confrontation under the Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights. The Appeals Court reversed his convictions, holding that his confrontation rights were violated. Commonwealth v. Rand, 97 Mass. App. Ct. 758, 759 (2020). We granted further appellate review.

We hold that most of the admitted statements were not made with the primary purpose of creating a substitute for trial testimony. See Michigan v. Bryant, 562 U.S. 344, 358 (2011).

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[1] The jury found the defendant not guilty of attempted murder, G. L. c. 265, § 16; and a second count of strangulation, G. L. c. 265, § 15D. The jury could not reach a verdict on a second count of assault and battery, and the Commonwealth filed a nolle prosequi.

Thus, they were nontestimonial and did not violate the defendant's confrontation rights. To the extent that the victim's statements evolved into being testimonial just prior to the victim entering the ambulance, that statement was duplicative of other evidence and its admission was harmless beyond a reasonable doubt. Thus, we affirm the defendant's convictions.

Background. Prior to the incident that precipitated this case, the defendant and the victim had dated on-again and off-again for approximately five years. They had a child together, and the defendant visited regularly.

On July 25, 2015, at approximately 12:45 A.M., the victim called 911.[2] She was sobbing and began the call by saying, "I need somebody to come to my house," and "My boyfriend just beat me up." When the dispatcher asked whether the boyfriend was

[2] The recording of the 911 call was offered in evidence, although no transcript was provided. On appeal to the Appeals Court, the Commonwealth provided a transcript in its brief, which the Appeals Court included as an Appendix, as do we. The defendant agrees with the transcript, with one exception: where the Appeals Court transcribed that the victim stated the defendant had left "two minutes ago," the defendant maintains that she said "ten minutes ago." While the number of minutes is difficult to hear, given the context we agree with the Appeals Court that it is more likely the victim said "two." When the dispatcher again asked the victim, "How long ago did he leave your house?" the victim stated, "Since I called, since I was able to get my phone." The context implies that the defendant left a very short time before, and thus it is more likely that it was two minutes.

still present, the victim replied that he had left with her sister "like two minutes ago, since I called you guys." The dispatcher asked, "What exactly happened tonight?" and the victim stated that her sister had been "causing trouble" and the boyfriend took the sister's side and then "knocked [the victim] out a couple of times." She indicated that her boyfriend had punched her in the face and "tried to kill [her]."

Approximately four minutes and thirty seconds into the call, Sergeant Phillip Yee and Officer John Connolly of the Braintree police department arrived at the victim's house. She was still on the telephone with the dispatcher. Yee had to contact the dispatcher over the police radio and ask her to tell the victim to hang up the telephone so that the victim could speak with the officers. Yee and Connolly testified that the victim was "very upset," "heav[ing]," "in tears, sobbing, [and] kind of hysterical."

Yee and Connolly asked the victim to tell them what happened, and she recounted that her boyfriend, whom she called Roy, had beaten her. She said that he "punched her several times in the head, [and] at one point he choked her and he used his knees to put on her throat." This had caused her to lose consciousness. When she woke up, he started hitting her again, and then choked her again, this time with his hands. As a result of losing consciousness, she had urinated on herself.

She also stated that her sister had "slapped her in the face with an open hand two or three times." Because the victim was complaining of pain in the back of her head, Yee called an ambulance. The officers also observed that the victim's eyes were "bloodshot and veiny . . . like there was . . . blood in them" and that her cheek and jawline were swollen and bruised. Yee and Connolly spoke to the victim for approximately five minutes when they first entered the apartment before the ambulance arrived. The victim's three year old daughter was also present in the apartment.

When the ambulance arrived, medics evaluated the victim. Yee and Connolly were still in the apartment, but spoke to the victim only "intermittently" so as not to interrupt the medical examination. The medics recommended that the victim be transported to a hospital. At first, she was reluctant to go and appeared to be scared. Yee directed Connolly to accompany the victim to the hospital and assured the victim that they would keep her safe. Yee told the victim that they would bring her daughter to the hospital as well to ensure the daughter's safety. As the officers were persuading the victim to go to the hospital, she indicated that she was still scared of the person who attacked her. She again named that person as the defendant. In total, Yee and Connolly were at the victim's apartment for ten to twenty minutes before she got into the ambulance.

Connolly then accompanied the victim in the ambulance to the hospital, where Yee eventually met both. At the hospital, Yee photographed the victim's injuries.

Shortly after the defendant was arraigned on the charges in this case, the victim stopped cooperating with the Commonwealth. Anticipating that she would not testify at trial, the Commonwealth filed two motions in limine: one to admit a recording of the victim's 911 call, and the other to admit statements that the victim had made to Yee and Connolly. The defendant opposed both motions. After two hearings in which the judge listened to the 911 call and conducted a voir dire of Yee and Connolly, the judge granted the Commonwealth's motion to admit the 911 call and granted in part the motion to admit the victim's statements to Yee and Connolly. The judge ruled that the victim's statements to Yee and Connolly were admissible up until the point that the victim left in an ambulance to go to the hospital.

Discussion. 1. Standard of review. "We accept the judge's findings of fact unless clearly erroneous but independently apply constitutional principles to the facts found" (citation omitted). Commonwealth v. Beatrice, 460 Mass. 255, 259 (2011). When a judge's findings are based on documentary evidence, such as a 911 call recording, we review those findings de novo. Commonwealth v. Tremblay, 480 Mass.

645, 654-655 (2018). Where the defendant objected, "we evaluate the admission of constitutionally proscribed evidence to determine whether it was harmless beyond a reasonable doubt." Commonwealth v. Wardsworth, 482 Mass. 454, 458 (2019), quoting Commonwealth v. Nardi, 452 Mass. 379, 394 (2008). "If the defendant's constitutional objection was not preserved, we still review the claim to determine whether there was a substantial risk of a miscarriage of justice." Commonwealth v. Galicia, 447 Mass. 737, 746 (2006).

2. Confrontation clause. Out-of-court statements offered for the truth of the matter and asserted by a declarant who does not testify at trial must pass two "distinct but symbiotic" tests to be admitted. United States v. Brito, 427 F.3d 53, 60 (1st Cir. 2005), cert. denied, 548 U.S. 926 (2006). "First, the statement must be admissible under our common-law rules of evidence as an exception [or exemption] to the hearsay rule." Beatrice, 460 Mass. at 258. "Second, the statement must be nontestimonial for purposes of the confrontation clause of the Sixth Amendment." Id. See Commonwealth v. Caruso, 476 Mass. 275, 295 n.15 (2017).[3] Here, the defendant concedes the statements at issue arguably fit within the spontaneous

[3] Testimonial hearsay is only admissible if the out-of-court declarant has been previously subject to cross-examination and is "unavailable" as a matter of law. Commonwealth v. Caruso, 476 Mass. 275, 295 n.15 (2017).

utterance exception to the rule against hearsay. See Mass. G. Evid. § 803(2) (2021). Thus, the sole issue on appeal is whether the statements were testimonial.

"Testimonial statements are those made with the primary purpose of 'creating an out-of-court substitute for trial testimony.'" Commonwealth v. McGann, 484 Mass. 312, 316 (2020), quoting Wardsworth, 482 Mass. at 464. See Commonwealth v. Imbert, 479 Mass. 575, 580 (2018), citing Bryant, 562 U.S. at 358; Commonwealth v. Middlemiss, 465 Mass. 627, 634 (2013). See also Wardsworth, supra at 464 n.18 ("the appropriate method of analysis is the 'primary purpose' test"). In essence, the inquiry looks at whether the out-of-court declarant's statement is the equivalent of bearing witness because "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Crawford v. Washington, 541 U.S. 36, 51 (2004). Thus, "[t]he question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" McGann, supra at 317, quoting Ohio v. Clark, 576 U.S. 237, 245 (2015).

Over time, the United States Supreme Court has refined the test to determine whether a statement is testimonial. When the Court reinvigorated the confrontation clause in Crawford, 541

U.S. at 51-52, it declined to set out a definition of "testimonial," although it cited to various examples that would be either testimonial or nontestimonial. Next, in Davis v. Washington, 547 U.S. 813, 822 (2006), the Court debuted the primary purpose test, stating that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[4] In Davis, the Court used the following factors to distinguish the nontestimonial statements there from the testimonial statements present in Crawford: "(1) whether the declarant was speaking about events as they were 'actually happening, rather than describ[ing] past events'; (2) whether any reasonable listener would recognize that the declarant was facing an 'ongoing emergency'; (3) whether what was asked and answered was necessary to resolve the present emergency rather than simply to learn what had happened in the past; and (4) the level of formality of the interview." Middlemiss, 465 Mass. at 633-634, quoting Davis, supra at 827.

[4] "While a discussion with a 911 telephone operator is not generally characterized as police interrogation, the United States Supreme Court has included 911 telephone calls within the rubric of 'interrogation,' regardless of whether the declarant's statements were in response to an operator's questions." Commonwealth v. Beatrice, 460 Mass. 255, 259 n.6 (2011), citing Davis v. Washington, 547 U.S. 813, 822-823 & n.2 (2006).

Five years later, in Bryant, 562 U.S. at 366, the Supreme Court further honed the primary purpose test. The Court clarified that although in Davis the inquiry had centered around whether there had been an ongoing emergency, "there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." Id. at 358. The Court stated that "whether an ongoing emergency exists is simply one factor -- albeit an important factor -- that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation."[5] Id. at 366. See Middlemiss, 465 Mass. at 634. The Court noted that in addition to whether there is an ongoing emergency, other factors to consider when deciding whether a statement is testimonial included "(1) the formality of the statements, and (2) the nature of 'the statements and actions of

[5] The defendant argues that the existence of an ongoing emergency is a necessary factor for a statement to be nontestimonial. This is incorrect. It is true that in Beatrice, 460 Mass. at 259, we stated that "for a statement to be nontestimonial, there must be an ongoing emergency, and the primary purpose of the interrogation must be to meet that emergency." Yet our subsequent decisions make clear that "the existence of an ongoing emergency is 'simply one factor -- albeit an important [one].'" Commonwealth v. Middlemiss, 465 Mass. 627, 634 (2013), quoting Michigan v. Bryant, 562 U.S. 344, 366 (2011). Cf. Commonwealth v. DeOliveira, 447 Mass. 56, 57 n.1 (2006) ("the protection provided by art. 12 is coextensive with the guarantees of the Sixth Amendment").

both the declarant and interrogators.'" Middlemiss, supra, quoting Bryant, supra at 366-367.

The Bryant Court also clarified that the test is objective, and thus "the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." Bryant, 562 U.S. at 360. It is not the interrogator's motive that ultimately matters. Rather, it is what a reasonable person in the victim's shoes would have intended that matters. However, what an interrogator says is not irrelevant. The content and tenor of the interrogator's questions can help to "illuminate the 'primary purpose of the interrogation.'" Id. at 369, citing id. at 382 (Scalia, J., dissenting).

An ongoing emergency is not necessary for a statement to be nontestimonial, yet when one is present it takes a central place in our analysis. Middlemiss, 465 Mass. at 634 ("the Bryant Court nevertheless stressed the centrality of the ongoing emergency factor in the primary purpose analysis"). The reason for this is straightforward: when preoccupied by an ongoing emergency, a victim is unlikely to have the presence of mind to create a substitute for trial testimony. See Bryant, 562 U.S. at 361. "Factors bearing on the existence of an ongoing

emergency include (1) whether an armed assailant poses a continued threat to the victim or the public at large, (2) the type of weapon that has been employed, and (3) the severity of the victim's injuries or medical condition." Middlemiss, supra, citing Bryant, supra at 364.

Although the factors from Bryant guide the analysis, they are nonexclusive, and determining whether a statement is testimonial is a "highly context-dependent inquiry." Middlemiss, 465 Mass. at 634, quoting Bryant, 562 U.S. at 363. For example, in Clark, 576 U.S. at 249, the Court focused on the victim's age and the fact that the statements were made to the victim's teacher, and noted that statements made to persons other than law enforcement "are significantly less likely to be testimonial." Even though the victim's age and the identity of the interrogator were not strictly included in the Bryant factors, the Court stressed the need to consider "all of the relevant circumstances." Id. at 244, quoting Bryant, supra at 369.

Finally, we note that interrogations that begin as nontestimonial can "evolve into testimonial" interrogations. Bryant, 562 U.S. at 365, quoting Davis, 547 U.S. at 828. "This evolution may occur if, for example, a declarant provides police with information that makes clear that what appeared to be an emergency is not or is no longer an emergency or that what

appeared to be a public threat is actually a private dispute." Bryant, supra. "Trial courts can determine in the first instance when any transition from nontestimonial to testimonial occurs . . . ." Id. While an interrogation often reaches a point where statements shift from one mode to the other, it is unlikely to toggle back and forth. Given that the ultimate focus of the inquiry is to determine the primary purpose of the statements, one's purpose generally does not fluctuate multiple times in a single conversation.

With this framework in mind, we turn to the facts of this case. We first analyze the statements the victim made to the 911 operator, and then the statements she made immediately afterward to responding officers.

3. 911 call. The defendant does not dispute that the portion of the 911 call up until the victim said her boyfriend had left is admissible. Thus, our analysis pertains solely to the remainder of the call. We hold that the entirety of the 911 call was nontestimonial.

The most important indication that the victim did not objectively intend to bear witness and create a substitute for trial testimony is how she reacted when the police responded to her apartment. On the 911 call, the victim sounded frenzied and emotional. When officers arrived, the victim appeared not to have realized who they were, and the dispatcher had to tell her

to hang up. Thus, not only was the 911 call highly informal, see Davis, 547 U.S. at 827 (victim's "frantic answers were provided over the phone, in an environment that was not tranquil, or even [as far as any reasonable 911 operator could make out] safe"); Middlemiss, 465 Mass. at 636 (911 call "plainly distinguishable from the formal station-house interrogation" [quotation and citation omitted]); Beatrice, 460 Mass. at 263 (911 call "informal and very brief"), but given that the victim did not even realize the police were at her house, a reasonable person in the victim's shoes would be unlikely to have any testimonial intent at all.

The fact that very little time had elapsed between the alleged assault and the 911 call adds context to the victim's statements. The victim stated to the dispatcher that the defendant had left "like two minutes ago, since I called you guys." Compare Commonwealth v. Lao, 450 Mass. 215, 226 (2007), S.C., 460 Mass. 12 (2011) (911 call likely testimonial because, between alleged assault and 911 call, victim had conversation with her daughter, called her mother, and spoke with defendant by telephone at least once).

The statements of the dispatcher also inform the primary purpose of the conversation. See Bryant, 562 U.S. at 367. The dispatcher's questions aimed to assess the situation -- whether the victim was injured, the extent of her injuries, and whether

the defendant was still on the scene. As in Middlemiss, 465 Mass. at 636, "the 911 operator's questions and the victim's answers were concerned primarily with assessing the victim's medical condition and collecting as much information as possible to prepare first responders for what they would soon encounter." See Bryant, supra at 376 ("The questions they asked -- 'what had happened, who had shot him, and where the shooting had occurred,' -- were the exact type of questions necessary to allow the police to assess the situation, the threat to their own safety, and possible danger to the potential victim and to the public, including to allow them to ascertain whether they would be encountering a violent felon" [quotations and citations omitted]). In other words, the primary purpose of these questions was objectively to provide Yee and Connolly with the information they needed to respond to the call, not to be a substitute for trial testimony.

None of this ignores the fact that interrogators have mixed motives. "Police officers in our society function as both first responders and criminal investigators. Their dual responsibilities may mean that they act with different motives simultaneously or in quick succession."[6] Bryant, 562 U.S. at 368. Thus, when the dispatcher asked, "What exactly happened

[6] Victims, too, are likely to have mixed motives. See Bryant, 562 U.S. at 368.

tonight?" she elicited a statement describing how the altercation began. Yet while one motive may well have been to gather information about a potential crime, the more urgent motive was likely to gauge the precarious and potentially dangerous situation into which the responding officers soon would be entering. Again, the test asks what the "primary" purpose of the questions was, not whether there was only one purpose behind them.

Next, we look to whether, based on what the parties knew at the time, there was an ongoing emergency. Although the existence of an ongoing emergency is "highly context-dependent," in Bryant, 562 U.S. at 363, the Court discussed three nonexclusive factors bearing on the existence of an emergency. Applying those factors here, even though the defendant was not armed and there was no indication that he posed a threat to the public at large, the dispatcher had to ask questions to ascertain whether there was any continued threat to the victim -- either because of her medical condition or because the defendant could return.

With respect to the victim's medical condition, when the dispatcher asked, "What exactly happened tonight?" that elicited the statement that the defendant had "knocked [the victim] out a couple of times." In turn, that statement prompted the dispatcher to ask whether the victim needed an ambulance, and

subsequently to order one. At other points in the call, the victim stated that the defendant had "beat [her] up," "punched [her] in the face," and "tried to kill [her]."

The fact that the dispatcher had decided to call an ambulance does not render any continued probing into the victim's medical condition improper. Where the victim had lost consciousness, it was reasonable to ask follow-up questions both to keep the victim awake and talking, as well as to ascertain any further details to relay to medical personnel in the case that she lost consciousness again. The dispatcher's statements -- "I want to make sure that everything's okay. All right? But I'm going to have you stay on the phone with me until I have officers that get there, okay?" -- reflect the dispatcher's continuing concern for the victim's medical condition.

With respect to whether the defendant planned to return, the fact that there was no direct indication that he would definitely return is not dispositive. Instead, because he had left "like two minutes" before the victim called the dispatcher, it was unclear how far away he was and how long he would remain away.[7] Moreover, he left with the victim's sister -- who had

[7] The defendant compares the 911 call here to the unchallenged portion of the 911 call in Davis, which occurred after the defendant had driven away from the premises. The Davis Court noted that it could be maintained that those statements were testimonial. Davis, 547 U.S. at 828-829.

also been involved in the altercation -- in tow. Whether they had left by foot or by car, and whether they had left the apartment, the building, or the larger area were all open questions. Contrast Davis, 547 U.S. at 830 (in Hammon v. Indiana, domestic violence case decided alongside Davis, no ongoing emergency where defendant was supervised by officer in separate room). Given these uncertainties, the dispatcher's questions, "How long ago did he leave?"; "How long ago did he leave your house?"; and "Okay, so he left a little while ago?" were primarily aimed at determining whether the defendant would return. Corroborating this concern is the fact that at the end of the call, the victim asked the dispatcher, "Now where did he go?" which shows that a reasonable person in her shoes would be concerned about the possibility that the defendant would return.

In an attempt to distinguish this situation, the defendant contrasts this case with Beatrice, 460 Mass. at 261, and argues that an ongoing emergency only existed there because the defendant remained on the scene. In Beatrice, the victim called

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Although the defendant here acknowledges that this portion of Davis is dicta, he does not acknowledge that in Bryant, the Court called this dicta into question. See Bryant, 562 U.S. at 363 ("The Michigan Supreme Court erroneously read Davis as deciding that 'the statements made after the defendant stopped assaulting the victim and left the premises did not occur during an "ongoing emergency"'" [citation omitted]). Thus, there is no per se rule that once a defendant has left the scene an ongoing emergency necessarily dissipates.

911 from a neighbor's apartment and reported that her boyfriend had assaulted her. Id. at 257. The victim urged police to arrive on the scene "now, before he leaves."[8] Id. Further, she stated that the defendant was "packing his stuff now," indicating that he remained in their shared apartment. Id. We acknowledge that the emergency in Beatrice may have been more pronounced than the one here given the certainty that the defendant remained on the scene. But that does not change the fact that the interrogation here was aimed at determining the likelihood of the defendant's return. As in Beatrice, the defendant could have been "[lying] in wait . . . in an attempt to do further harm." Id. at 262. It was simply unclear where the defendant had gone just moments earlier and whether he would return. Thus, we hold that the primary purpose of the 911 call was not to create a substitute for trial testimony. The court did not err by admitting it.

4. Statements to responding officers. Next, we turn to the statements the victim made to Yee and Connolly after they arrived at her apartment. The trial judge ruled that any statements the victim made after she left the apartment in an ambulance were testimonial and therefore inadmissible.

[8] Here, similarly, the victim urged police to come to her home. She began the 911 call saying, "I need somebody to come to my house."

Therefore, our analysis pertains to the statements she made to Yee and Connolly in her apartment before departing in an ambulance. The majority of the conversation with Yee and Connolly took place during the first five minutes after they arrived in the apartment. It continued only intermittently after the medics arrived and began evaluating the victim. Because the conversation with Yee and Connolly immediately followed the 911 call, many of the circumstances are the same. Nevertheless, we address the conversation with Yee and Connolly separately to home in on additional details the officers observed that bear on the primary purpose analysis. We hold that while the bulk of the victim's statements were nontestimonial, one statement as she was poised to enter the ambulance evolved into being testimonial.

First, looking to the formality of the statements, we have a sense of the victim's demeanor from the 911 call. As stated, the fact that the victim did not even register that the police had arrived gives us an indication of the ability of a reasonable person in her shoes to have any testimonial intent at all. Indeed, Yee testified that when they arrived, the victim was "very, very upset," and refused to hang up the telephone with the dispatcher. To get her to hang up, he told the dispatcher over the police radio to ask the victim to hang up the telephone so she could speak to the officers. Moreover, the

conversation occurred immediately after the officers arrived, which was approximately seven minutes after the assault occurred.[9] Compare Davis, 547 U.S. at 830 (in Hammond case, statements testimonial where they "took place some time after the events described were over," husband was forcibly prevented from participating in interrogation, and statements "deliberately recounted . . . how potentially criminal past events began and progressed").

Next, the statements and actions of the victim and the officers also show that the primary purpose was not to create a substitute for trial testimony. Like the dispatcher, Yee and Connolly asked questions aimed at assessing the situation and ascertaining the extent of the victim's injuries. See Bryant, 562 U.S. at 376 ("The questions they asked -- 'what had happened, who had shot him, and where the shooting had occurred,' -- were the exact type of questions necessary to allow the police to assess the situation, the threat to their own safety, and possible danger to the potential victim and to the public" [quotation and citations omitted]). Indeed, this is consistent with Yee's and Connolly's statements during voir dire. Connolly stated that when he spoke to the victim, "It was

[9] On the 911 call, the victim stated that the defendant had left "like two minutes ago." The 911 call is approximately five minutes and twenty seconds long, and Yee and Connolly arrived at the end of it.

definitely because of medical purposes because she was presenting with obvious injuries, and also because she didn't know where her alleged attacker was." Similarly, Yee stated his purpose was "to find out if she was hurt and why we were there, basically."

Again, we are not blind to the fact that responding officers often have mixed motives. Yee's testimony at voir dire encapsulates this:

> "I mean, obviously, when we first arrived, she's crying, she's upset, she looks like she's injured. I mean, I wanted to get her treatment, to get her help. Okay? At the same time, I also wanted to figure out who had done this to her, how this had happened and who had done this to her. So we were trying to gather as much information as we can at the time."

Yet the mere fact that officers have mixed motives does not automatically render an out-of-court declarant's statement testimonial. See Bryant, 562 U.S. at 368. Rather, it is one more piece of information to consider when trying to discern the primary purpose behind the out-of-court declarant's statements.

Finally, we look to whether there was an ongoing emergency. Like the dispatcher, when Yee and Connolly arrived on the scene, they were trying to ascertain whether there was any continued danger to the victim. Indeed, the fact that Yee looked through the rest of the apartment to secure the scene corroborates the fact that officers could not be sure whether the defendant had left, even though the victim was under the impression that he

had.[10] As stated supra, given that the defendant had left only minutes before, he had gone with the victim's sister, and it was not clear whether they had departed in a vehicle, there was no assurance that they would not return imminently. Contrast Davis, 547 U.S. at 830 (no ongoing emergency where defendant was supervised by officer in separate room). Indeed, this is corroborated by the victim's reaction at the hospital when Yee mistakenly told her that the defendant had been arrested.[11] Connolly testified that "there was minimal change [in her visibly upset demeanor] up until we mistakenly told her that [the defendant] was in custody."[12] Yee testified that after hearing the defendant had been arrested, the victim "seemed like she was relieved." In other words, a reasonable person in the

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[10] The defendant argues that the fact that this sweep did not take place until after the ambulance arrived meant that officers could not have perceived any safety threat upon their arrival. Yet just because the officers first spoke with the victim before sweeping the apartment does not mean that there were no objective indications that a safety threat remained.

[11] Information about the victim's reaction came out at voir dire but not at trial.

[12] The mistake occurred because while Yee and Connolly were at the hospital with the victim, they received a call that someone was trying to get into the victim's apartment. Yee overhead someone on the police radio say, "We have him in custody." He assumed this referred to the defendant. In truth, only the victim's sister was in custody. Once Yee found that out, he returned to the victim to inform her he had been mistaken. Upon hearing that the defendant had not been arrested, the victim was upset.

victim's shoes would have been concerned about the defendant's return. See Beatrice, 460 Mass. at 262 ("even if the assailant is not armed, a reasonable person would recognize that an enraged boy friend might . . . lie in wait . . . in an attempt to do her further harm").

More importantly, the victim's medical condition bears on both whether there was an ongoing medical emergency and whether she would have been able to have "any purpose at all in responding to police questions." Bryant, 562 U.S. at 365. In Bryant, the Court stated that it had "not previously considered, much less ruled out, the relevance of a victim's severe injuries to the primary purpose inquiry." Id. at 364. A victim's medical condition "sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one" as well as provides context on "the existence and magnitude of a continuing threat to the victim." Id. at 365.

Here, when Yee and Connolly arrived, they observed "swelling and bruising on and around [the victim's] face, along her jawline and cheeks and neck area," and that her eyes were red. She recounted to them that she had been "punched in the face, elbowed in the face and strangled several times," and that the defendant had strangled her "[w]ith his knee and also with a

grip with his hands around her neck." Moreover, the strangulation caused her to lose consciousness twice and urinate in her pants. The severity of the victim's injuries -- especially the fact that she had recently lost consciousness -- makes her ability to have any testimonial intent unlikely. See Bryant, 562 U.S. at 364.

The defendant argues that as soon as officers were aware that an ambulance was en route, further questioning could not have been for the purpose of determining whether medical attention was necessary; they had already decided it was.[13] While that may be factually correct, it mischaracterizes the

[13] On the 911 call, the dispatcher can be heard telling responding officers that an "X-ray's en route." Connolly testified at trial that the officers believed an ambulance was en route to the home before they arrived.

Separately, officers also called for an ambulance after they had arrived at the victim's house. From the record, it is not clear how long into Yee and Connolly's conversation with the victim that they made that call. Connolly testified at voir dire that Yee called an ambulance as soon as they encountered the victim because she was "presenting with obvious injuries." On the other hand, Yee testified at voir dire and trial that he called for the ambulance only after the victim stated she had been strangled and complained of pain to her head.

The defendant points out that even if officers had not been aware that an ambulance had been sent by dispatch, they also called an ambulance as soon as they arrived and saw the victim's injuries. After that call, they continued to question the victim about her injuries.

ongoing emergency analysis.[14] Just because an ambulance has been called does not mean that any potential medical emergency has dissolved. On the contrary, strangulation injuries can be quite serious, and if they go "unrecognized and untreated, delayed life-threatening airway obstruction or long term vocal dysfunction may result." Funk & Schuppel, Strangulation Injuries, 102 Wisc. Med. J., no. 3, 2003, at 42. Contrast Beatrice, 460 Mass. at 260 ("no suggestion that [the victim's] injuries were serious or life threatening"). In this scenario, it was prudent for the police officers to continue collecting medical information from the victim in case they needed to relay it to paramedics upon their arrival.

Thus, given the victim's injuries and the uncertainty about whether the defendant would return, there was initially an ongoing emergency. That changed, however, once the victim was poised to leave for the hospital. Although an ongoing emergency

[14] This confusion likely has roots in the "testimonial per se" discussion in Commonwealth v. Gonsalves, 445 Mass. 1, 3 (2005), cert. denied, 548 U.S. 926 (2006), which has since been abrogated. See Commonwealth v. Wardsworth, 482 Mass. 454, 464 n.18 (2019). In Gonsalves, supra, we held that "statements made in response to questioning by law enforcement agents are per se testimonial, except when the questioning is meant to secure a volatile scene or to establish the need for or provide medical care." Yet as Wardsworth, supra, makes clear, the test in Gonsalves is no longer the law after Bryant, 562 U.S. at 358. Thus, the proper focus is now on the primary purpose of the statement, not only on whether it is aimed at establishing the need for medical care or securing a volatile scene.

is not a necessary condition for a statement to be nontestimonial, given the context-dependent nature of the inquiry, instances will arise where the dissipation of the emergency does cause the primary purpose to evolve. See Bryant, 562 U.S. at 365. This is such a case.

After an evaluation, the medics encouraged the victim to go to the hospital. She was initially too scared to go, but Yee and Connolly persuaded her to, assuring her that Connolly would go with her to keep her safe. Yee told the victim they would bring her daughter, too, to ensure her safety as well. During this conversation, Yee asked the victim what she was still scared of, and she indicated the person who attacked her. She again named her attacker as the defendant.

At this point, the ongoing emergency had dissipated. Although the defendant's whereabouts were still unknown, the victim was about to go to the hospital, where the defendant would be unlikely to find her, and she would be accompanied by a police officer to boot. Thus, the defendant was no longer a continuing threat at the time. See Bryant, 562 U.S. at 365. The diffusion of the ongoing emergency, and the fact that the victim was then about to leave the scene in the company of a police officer, caused the primary purpose of the interrogation to evolve from nontestimonial to testimonial. That the victim was still upset and the conversation continued to be informal

does not mandate a different conclusion. The primary purpose analysis is delicate and highly fact dependent, Bryant, 562 U.S. at 363, so a single change in circumstance such as this can be enough to cause statements to evolve into being testimonial. Thus, it was error to allow Yee to testify that during this final moment in the apartment, the victim named her attacker as the defendant.[15]

This evidence, however, was harmless because it was duplicative of the properly admitted evidence. The victim had already identified her attacker as the defendant on the 911 call, as well as to Yee and Connolly multiple times during the initial interrogation. We are confident that the error was harmless beyond a reasonable doubt. See Wardsworth, 482 Mass. at 458, citing Nardi, 452 Mass. at 394.[16]

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[15] The concurrence argues that the judge did not err by admitting this statement, stating that in her view the ongoing emergency had not yet dissipated. We disagree, but note that the divergence of views shows how fact intensive the inquiry is, and the importance of trial judges "determin[ing] in the first instance when any transition from nontestimonial to testimonial occurs." Bryant, 562 U.S. at 365.

[16] The defendant and the Commonwealth disagree about whether the admission of the victim's statements to Yee and Connolly were properly objected to, and therefore what standard of review applies. We need not address this issue, because even under the standard more favorable to the defendant, we hold that the admission of this cumulative testimony was harmless beyond a reasonable doubt.

Conclusion. For the foregoing reasons, the defendant's convictions are affirmed.

So ordered.

CYPHER, J. (concurring). I concur. I write separately because I do not think that the judge erred in admitting the statements made by the victim just before she entered the ambulance.[1] To distinguish nontestimonial statements from testimonial statements, we consider the primary purpose of the interrogation. See Michigan v. Bryant, 562 U.S. 344, 360 (2011). As the court notes, the United States Supreme Court has concluded that "[a]n objective analysis of the circumstances of

[1] As I read the record, it is not clear to me that the victim identified the defendant just before she entered the ambulance. My reading of the transcript shows that, during redirect examination, the prosecutor asked a series of questions about the victim's fear of going to the hospital. The officer testified that he assured the victim that he would keep her and her daughter safe. The prosecutor asked, "Safe from what?" The defendant objected, and the judge overruled the objection. The officer answered, "Safe from whoever attacked her." The prosecutor then asked, "And who did she say attacked her?" The officer answered, "Mr. Rand." As the court notes, the victim had identified the defendant as her assailant in her initial statements. Defense counsel, who had objected as necessary, did not object in this instance, further indicating that this question and answer did not implicate additional potentially testimonial evidence. I also do not think that the issue regarding this statement is adequately raised in the defendant's brief. See Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019). In fact, the only portion of the transcript referenced in the defendant's brief to support what could be interpreted as this argument concerns cross-examination. Defense counsel asked the officer, "According to [the victim], Mr. Rand . . . arrived home at 12:00 o'clock, right?" The officer answered, "Approximately." Not only was this testimony given on cross-examination, but there was also no indication as to when the victim made this statement to the officer or if she named the defendant when she said what time he arrived home. Nevertheless, I analyze this issue in accord with the way the court reads the transcript.

an encounter and the statements and actions of the parties to it provides the most accurate assessment of the primary purpose of the interrogation" (quotation omitted). Id. In determining the primary purpose of the interrogation, we consider whether police are responding to an ongoing emergency and whether there are other circumstances present that suggest the "statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." Id. at 358. In addition to considering whether there is an ongoing emergency, we consider factors such as "the medical condition of the victim," the level of formality of the interview, and "the statements and actions of both the declarant and interrogators." Id. at 364-367. These factors, however, are not exhaustive, see id. at 357, and we must consider "all of the relevant circumstances," id. at 369. See Davis v. Washington, 547 U.S. 813, 822 (2006).

When these factors are balanced, and we consider all the relevant circumstances, it appears to me that the victim's statements just before she entered the ambulance were admissible. Although the victim was no longer being attacked, the attack had occurred very recently. It is readily apparent, given the victim's physical and emotional condition, that she was in crisis and "facing an 'ongoing emergency.'" Commonwealth v. Middlemiss, 465 Mass. 627, 633 (2013), quoting Davis, 547 U.S. at 827. Finally, there was no formality to the interview.

See Middlemiss, supra, citing Bryant, 562 U.S. at 366. The statements she made at this time were "not procured with a primary purpose of creating an out-of-court substitute for trial testimony." Bryant, supra at 358.

I recognize that the excited utterance and testimonial hearsay inquiries are separate, but related. "While both inquiries look to the surrounding circumstances to make determinations about the declarant's mindset at the time of the statement, their focal points are different. The excited utterance inquiry focuses on whether the declarant was under the stress of a startling event. The testimonial hearsay inquiry focuses on whether a reasonable declarant, similarly situated (that is, excited by the stress of a startling event), would have had the capacity to appreciate the legal ramifications of her statement." United States v. Brito, 427 F.3d 53, 61 (1st Cir. 2005), cert. denied, 548 U.S. 926 (2006). The focus under either approach, however, is on the declarant.

Here, the analysis of the victim's statements by the court applies equally to the statement that the court states is inadmissible. The victim initially was too scared to go with the medics in the ambulance to the hospital. As the court notes, Yee and Connolly convinced her to go and told her that Connolly would accompany her to keep her safe and that her daughter could go with her for her daughter's safety. The

officers asked the victim what she was still scared of. She answered that she was afraid of her attacker.

"[T]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." Bryant, 562 U.S. at 360. It does not appear to me, even under the objective standard, that a reasonable person in the victim's shoes would have had "the capacity to appreciate the legal ramifications of her statement." Brito, 427 F.3d at 61.

Appendix.

The text of the 911 call is set forth below. Remarks to "aside" are to responding the police officers or ambulance.

The victim: "Hello?"

The dispatcher: "Braintree police dispatcher Wood, this call is recorded."

The victim: "Yes, I need somebody to come to my house."

The dispatcher: "Okay, where are you?"

The victim: "[street address]."

The dispatcher: "All right, hold on, I need you to take a deep breath for me, okay? What's your address?"

The victim: "[street address]."

The dispatcher: "[street address]? What's going on there?"

The victim: "My boyfriend just beat me up."

The dispatcher: [Aside] "A-7, [street address], female just got beat up by her boyfriend."

The dispatcher: "Are you there right now with him?"

The victim: "No, he left."

The dispatcher: "Okay, just stay on the phone with me, okay? I've got units headed your way. What's your name, honey?"

The victim: "[victim's name]."

The dispatcher: "What's your boyfriend's name?"

The victim: "Roy Rand."

The dispatcher: "All right, hold on, I'm going to have to go -- go a little slow. What's his first name?"

The victim: "Roy."

The dispatcher: "Roy, R-O-Y?"

The victim: "Yes."

The dispatcher: "And spell his last name for me."

The victim: "R-A-N-D."

The dispatcher: "Okay."

The victim: "He's from Brockton."

The dispatcher: "He's from Brockton? What kind of car, what kind of car does he have?"

The victim: "I don't know."

The dispatcher: "All right, hold on one second, okay? What exactly happened tonight?"

The victim: "He came home at twelve, and then, my sister was here and she was causing trouble and stuff like that. And I blamed, will you take her out of this house because we can't have her here. And then he was just taking sides with her and stuff like that and then I talked about it and he knocked me out a couple of times."

The dispatcher: [Aside] "[street address]. Boyfriend's no longer on scene. He fled in an unknown vehicle."

The victim: "And then he punched me in the face."

The dispatcher: "He punched you in the face?"

The victim: "Yes."

The dispatcher: "Okay. Do you need an ambulance, honey?"

The victim: "I don't know."

The dispatcher: "Are you bleeding?"

The victim: "No. But my face is swollen."

The dispatcher: "All right, hold on one second, okay?"

The victim: "Yeah."

The dispatcher: [Aside] "[Inaudible] [street address] in Braintree, for a domestic assault and battery."

The dispatcher: "Okay, what I'm going to have to do is have an ambulance come, just so they can check you out, okay? I want to make sure that everything's okay. All right? But I'm going to have you stay on the phone with me until I have officers that get there, okay?"

The victim: "Yeah, and my sister left, too, with him."

The dispatcher: "Your sister left with him?"

The victim: "Yes."

The dispatcher: "Okay."

The victim: "After he beat me up and stuff."

The dispatcher: "How long ago did he leave?"

The victim: "Like two minutes ago, since I called you guys."

The dispatcher: "How long ago did he leave your house?"

The victim: "Since I called, since I was able to get my phone."

The dispatcher: "Okay, so he left a little while ago? Is there an apartment number, or is it a single-family home?"

The victim: "Three-family."

The dispatcher: "Okay, what apartment are you in?"

The victim: "Uh, one. [Inaudible]. They both left together."

The dispatcher: "What apartment do you live in, honey?"

The victim: "One."

The dispatcher: "You live in apartment one?"

The victim: "Yeah."

The dispatcher: "Okay, hold on one second."

The dispatcher: [Aside] "Units to [street address], the female's going to be in apartment one. She's by herself."

The victim: "He tried to kill me."

The dispatcher: [Aside] "Roger."

The dispatcher: "All right. Can you go to your door and see the police officers?"

The victim: "Yeah."

The dispatcher: "Can you go let them in?"

The victim: "I'm in here."

The dispatcher: "Okay. Do you see the police cars?"

The victim: "Yes, I see lights."

The dispatcher: "You see lights? Can you yell to them so they know where you are?"

The victim: "Yeah, I see them."

The dispatcher: "Are you with them?"

The victim: "Yeah."

The dispatcher: [Aside] "A-1-7, were you able to find her? Roger, an X-ray's en route."

The dispatcher: "All right, go talk to them, okay, honey?"

The victim: "Now where did he go?"

The dispatcher: "Go talk to the police officers, okay?"

The victim: "Okay."

The dispatcher: "All right. Bye-bye."